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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 WILLIAM CECIL THORNTON,  
12 CDCR #V-64547

13 Plaintiff,

14 vs.  
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16 KAMALA HARRIS;  
17 MATTHEW CATE,

18 Defendant.  
19  
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Civil No. 11cv1525 WQH (BGS)

**ORDER:**

**(1) DENYING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
AS BARRED BY 28 U.S.C. § 1915(g)  
[ECF No. 2]**

**AND**

**(2) DISMISSING CASE FOR  
FAILURE TO PAY FILING  
FEE REQUIRED BY  
28 U.S.C. § 1914(a)**

21 Plaintiff, a state prisoner proceeding pro se and currently incarcerated at the California  
22 Correctional Institution in Tehachapi, California, initially filed this civil rights action pursuant  
23 to 42 U.S.C. § 1983 in the Eastern District of California. On July 11, 2011, Magistrate Judge  
24 Gerald B. Cohn determined that the issues brought by Plaintiff arose from events that occurred  
25 in the Southern District of California. Thus, the matter was transferred to the Southern District  
26 of California on July 11, 2011.

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1 Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a); instead, he  
 2 has submitted a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
 3 [ECF No. 2].

#### 4 I.

#### 5 Motion to Proceed IFP

6 Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil  
 7 litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2).  
 8 However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the  
 9 privilege to proceed IFP:

10 . . . if the prisoner has, on 3 or more prior occasions, while  
 11 incarcerated or detained in any facility, brought an action or appeal  
 12 in a court of the United States that was dismissed on the grounds  
 13 that it is frivolous, malicious, or fails to state a claim upon which  
 relief can be granted, unless the prisoner is under imminent danger  
 of serious physical injury.

14 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.”  
 15 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to  
 16 § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; see also *Andrews v.*  
 17 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (under the PLRA,  
 18 “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP  
 19 status under the three strikes rule[.]”). The objective of the PLRA is to further “the  
 20 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*,  
 21 128 F.3d 1310, 1312 (9th Cir. 1997).

22 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which were  
 23 dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”  
 24 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court styles  
 25 such dismissal as a denial of the prisoner’s application to file the action without prepayment of  
 26 the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has  
 27 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP  
 28 action in federal court unless he can show he is facing “imminent danger of serious physical

injury.” *See* 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP complaints which “make[] a plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time of filing.”).

While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his request to proceed IFP, *Andrews*, 398 F.3d at 1119, “[i]n some instances, the district court docket records may be sufficient to show that a prior dismissal satisfies at least one of the criteria under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. When applying 28 U.S.C. § 1915(g), however, the court must “conduct a careful evaluation of the order dismissing an action, and other relevant information,” before determining that the action “was dismissed because it was frivolous, malicious or failed to state a claim,” since “not all unsuccessful cases qualify as a strike under § 1915(g).” *Id.* at 1121.

The Ninth Circuit has held that “the phrase ‘fails to state a claim on which relief may be granted,’ as used elsewhere in § 1915, ‘parallels the language of Federal Rule of Civil Procedure 12(b)(6).’” *Id.* (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)). *Andrews* further holds that a case is “frivolous” for purposes of § 1915(g) “if it is of little weight or importance” or “ha[s] no basis in law or fact.” 398 F.3d at 1121 (citations omitted); *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it lacks an arguable basis in either law or in fact .... [The] term ‘frivolous,’ when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.”). “A case is malicious if it was filed with the intention or desire to harm another.” *Andrews*, 398 F.3d at 1121 (quotation and citation omitted).

## II.

### Application of 28 U.S.C. § 1915(g)

As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint and has ascertained that he makes no “plausible allegation” to suggest Plaintiff “faced ‘imminent danger of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)). Therefore, Plaintiff may be barred from proceeding IFP in this action if he

1 has on three prior occasions had civil actions or appeals dismissed as frivolous, malicious or  
 2 for failing to state a claim. *See* 28 U.S.C. § 1915(g).

3 A court ““may take notice of proceedings in other courts, both within and without the  
 4 federal judicial system, if those proceedings have a direct relation to matters at issue.”” *Bias*  
 5 *v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d  
 6 801, 803 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens*  
 7 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Here, the Court takes judicial notice  
 8 that Plaintiff has had at least three prisoner civil actions dismissed on the grounds that they were  
 9 frivolous, malicious, or failed to state a claim upon which relief may be granted. They are:

- 10 1) *Thornton v. Neotti, et al.*, Civil Case No. 10cv1677 LAB (BGS) (S.D. Cal.  
 11 January 3, 2011 Order dismissing Second Amended Complaint for failure to state  
 12 a claim upon which relief may be granted) (strike one);
- 13 2) *Thornton v. Schwarzenegger, et al.*, Civil Case No. 10cv1583 RBB (S.D. Cal.  
 14 June 1, 2011 Order Granting Defendants’ Motion to Dismiss for failure to state  
 15 a claim upon which relief may be granted) (strike two); and
- 16 3) *Thornton v. Cate, et al.*, Civil Case No. 10cv1585 JLS (PCL) (S.D. Cal. June 28,  
 17 2011 Order dismissing Second Amended Complaint for failure to state a claim  
 18 upon which relief may be granted) (strike three).

19 Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes”  
 20 pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced imminent  
 21 danger of serious physical injury at the time he filed his Complaint, he is not entitled to the  
 22 privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169  
 23 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing  
 24 the courts; it only precludes prisoners with a history of abusing the legal system from  
 25 continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221,  
 26 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not  
 27 right.”).

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2 **III.**

3 **Conclusion and Order**

4 For the reasons set forth above, the Court hereby **DENIES** Plaintiff's Motion to Proceed  
5 IFP [ECF No. 2] pursuant to 28 U.S.C. § 1915(g) and **DISMISSES** this action without  
6 prejudice for failure to pay the \$350 civil filing fee required by 28 U.S.C. § 1914(a).

7 The Clerk shall close the file.

8 **IT IS SO ORDERED.**

9 DATED: July 25, 2011

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11 **WILLIAM Q. HAYES**  
12 United States District Judge  
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